IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-425

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners
v.
DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners
v.
WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONERS

Of Counsel:

ROYSTON, RAYZOR,
VICKERY & WILLIAMS

E. D. VICKERY
W. ROBINS BRICE
3710 One Shell Plaza
Houston, Texas 77002
Attorneys for Petitioners

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

LIST OF AUTHORITIES

CASES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-425

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners
v.
DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners
v.
WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

Two cases involving identical issues and complementary fact situations under the 1972 Amendments to the Longhorsemen's and Harbor Workers' Compensation

Act are before the Court for the second time. Both cases were dealt with in a single opinion by the Court of Appeals for the Fifth Circuit, reported sub nom *Perdue v. Jacksonville Shipyards, Inc.*, 539 F.2d 533 (1976), and reprinted as Appendix C to the Petition for a Writ of Certiorari in this case (hereafter Pet.), pages 30 to 55. The Court vacated the judgments based on that 1976 opinion and remanded these cases to the Court of Appeals for the Fifth Circuit for reconsideration in light of the Court's opinion in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977). The Court's Order of Remand is reported at 433 U.S. 904 (1977), and is reprinted as Appendix B to the Petition, Pet. p. 29.

After remand by the Court, the Court of Appeals below reaffirmed its earlier decision based on its prior opinion cited above. The court's brief opinion reaffirming its prior decision is reported at 575 F.2d 79 (5th Cir. 1978), and is reprinted as Appendix A to the Petition, Pet. pp. 27 to 28.

These cases had previously reached the Court of Appeals upon petition for review from the administrative tribunals of the United States Department of Labor. In both cases, the Administrative Law Judge found no federal jurisdiction, the Benefits Review Board reversed, and the Court of Appeals for the Fifth Circuit affirmed the Benefits Review Board. The opinion of Administrative Law Judge Vanderheyden in the *Ford* case is not reported but is printed as Appendix 4, App. pp. 20-40. The opinion of the Benefits Review Board of the Department of Labor in *Ford* is reported at 1 BRBS 367, and is reprinted as Appendix 5, App. pp. 41-45. The opinion of Administrative Law Judge Devaney in the *Bryant* case is not reported but is reprinted as Appendix 9, App. pp. 64-92. The opinion of the Benefits Review Board in *Bryant* is reported at 2 BRBS 408 and is reprinted as Appendix 10, App. pp. 93-98.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit on remand from the Court was rendered on June 16, 1978. The Petition for a Writ of Certiorari was filed September 13, 1978, and the Petition was granted November 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether by the 1972 Amendments to the Longshoremen's Act,[1] Congress intended to extend the jurisdiction of the Act ashore to categories of non-amphibious, warehouse or terminal workers who fail to satisfy any of the Court's post-amendment criteria for such jurisdiction, as enumerated in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977), because:

   a. Prior to the 1972 Amendments they had, and still have, a uniform compensation system which provides "continuous coverage throughout their employment,"[2] and therefore are not subject to the "shifting and fortuitious coverage that Congress intended to eliminate."[3]

---

1. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, was amended October 27, 1972, Public Law 92-576.

2. *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, at 273 (1977).

3. *Id.* at 274.

b. They are not "'amphibious workers," i.e., not subject to being assigned to work both aboard vessels and on land in the course of their employment;[4]

c. They never perform any work on navigable waters, and

d. They never engage in "indisputably longshoring operations;"[5] i.e., they never unload (physically remove and store in warehouse) cargo from or load (physically remove from warehouse and place) cargo onto a vessel.

2. Whether the employee Bryant meets the "status test" required for Longshoremen's Act jurisdiction when as a "cotton header" (terminal worker) he was unloading cotton bales from a cotton dray wagon and storing them in a pier-side warehouse to await the subsequent arrival in port (five days later) of the vessel on which the cotton was to be loaded (physically removed from such storage and placed aboard the vessel) by longshoremen employed by a stevedoring company completely independent from and unrelated to Bryant's employer?

3. Whether the employee Ford meets the "status test" required for Longshoremen's Act jurisdiction when as a member of a warehouse labor gang he was securing a military vehicle onto a railroad car on the dock after the vehicle had been in storage on or near the dock since the time the delivering vessel had sailed (two to seventeen days before), and Ford's employer had in no way participated in the longshoring operations of unloading

4. *Id.* at 273.

5. *Id.*

(physical removal from vessel and placing in storage area on dock) of the military vehicle from the vessel?

4. In reaching conflicting results on the basic jurisdictional issue of the extent to which Congress intended to extend the Longshoremen's Act ashore, the various Courts of Appeals also reached conflicting and diverging results on two subsidiary questions on which an authoritative decision by the Court is needed:

a. What, if any, weight is to be given to the statutory presumption that a claim comes within the provisions of the Act, 33 U.S.C.A. § 920, which this Court has held to be inapplicable when there is substantial evidence in the record on the facts at issue.[6]

b. What, if any, deference is owed by a Court of Appeals to the holdings of the Benefits Review Board on the question of the statutory jurisdiction of the Longshoremen's Act?[7]

STATUTES INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:

Section 2(3), 86 Stat. 1251, 33 U.S.C. § 902(3):

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not

6. See discussion *infra*, p. 45.

7. See discussion *infra*, p. 46.

include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

Section 2(4), 86 Stat. 1251, 33 U.S.C. § 902(4):

"The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

Section 3(a), 86 Stat. 1251, 1265, 33 U.S.C. § 903(a):

"Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *"

STATEMENT OF THE CASE

In 1977, this Court rendered its first decision interpreting the 1972 shoreside extension of Longshoremen's Act jurisdiction. *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977). The present two cases[8] were pending in this court at that time. After its decision in *Caputo,* this

8. Two cases presenting complementary fact situations (loading/unloading) were decided together by the court below and have been brought to this Court in a single petition. Rule 23(5), Rules of the Supreme Court of the United States.

Court vacated the judgments of the Court of Appeals in these cases and remanded them for reconsideration in light of *Caputo.*[9]

Petitioners are employers[10] of persons who work in the dockside areas adjoining navigable waters. The respondent employees are workers who sustained injuries while transferring breakbulk cargo to or from land transportation in a shoreside storage area.[11] At the time of his injury Respondent Ford was standing on a railroad flatcar securing a military vehicle for carriage to an inland arsenal.[12] The military vehicle had been returned to the United States on a ship and had been stored in an open, shoreside storage area pending its on-carriage by rail. The ship which delivered the military vehicle had departed at least two days and possibly as many as seventeen days prior to the day of the accident,[13] and Ford and his co-workers were hired from the Warehousemen's Local Union of the International Longshoremen's Association to secure the military vehicles on the railcars. No ship was at the dock, and in any event, the applicable labor contract would have prohibited these workers from the Warehousemen's Local Union from working aboard ships or assisting in the movement of cargo directly to or from ships.[14]

9. 433 U.S. 904 (1977), Pet., p. 29.

10. And their compensation insurance underwriter.

11. Both were injured in an adjoining area ashore which meets the situs requirements for jurisdiction under the Longshoremen's Act. Thus this case involves only the maritime employment status requirements of the Act.

12. App. p. 6 (Stip.), 24 (ALJ Opinion below).

13. App. p. 7 (Stip.), 25 (ALJ Opinion below).

14. App. p. 11 (Stip.), 30 (ALJ Opinion below).

Respondent Bryant was injured while standing on a cotton dray wagon utilized to bring cotton bales from the compress company to a shoreside warehouse for eventual shipment overseas.[15] He was assisting the wagon driver in unloading the bales from the wagon and "heading" them into a storage location in the pier-side warehouse.[16] The cotton bales being handled were subsequently loaded aboard a ship which arrived in port five days after Bryant's injury. Petitioner (Bryant's employer) performs no longshoring operations—no ship loading or unloading work— at any time, and the bales in question were eventually loaded aboard ship (physically removed from warehouse and placed aboard ship) by longshoremen employed by a stevedoring company completely unrelated to Bryant's employer.[17] In fact Bryant's employer never loaded or unloaded any vessels.

In *Caputo* the Court recognized (1) that prior to the 1972 Amendments only the employer had to satisfy the "maritime employment" status requirement, and the injured employee had to meet only the situs requirement, and (2) that the 1972 Amendments for the first time required the injured employee to meet the maritime employment status requirement in addition to the situs requirement.[18] In determining whether employees Blundo and Caputo met the maritime employment status requirement, the Court recognized the two motives of the Congress in extending the Act's coverage ashore:

1. As to employees like Blundo, Congress' motivation came from its "recognition that 'the advent

15. App. p. 47 (Stip.), 69 (ALJ Opinion below).
16. *Id.*
17. App. pp. 49-50 (Stip.), 68, 70 (ALJ Opinion below).
18. 432 U.S. at 264-265.

of modern-cargo handling techniques' had moved much of the longshoremen's work off the vessel and onto land."[19] The Court held that a container is a "modern substitute for the hold of the vessel," that the loading and unloading of containers ashore was work that prior to this modern cargo handling technique had been performed onboard ship, and thus that Blundo met the maritime employment status requirement of the 1972 Amendments.[20]

2. As to employees like Caputo, engaged in break-bulk cargo, Congress was motivated by its desire to provide a uniform compensation system for "amphibious workers who without the 1972 Amendments, would be covered for only a part of their activity,"[21] and thus put an end to the pre-1972 system in which an employee's compensation remedy, whether state or federal, was determined by the "fortuitous circumstance of whether the injury occurred on land or over water."[22] The Court held Caputo was such an amphibious worker because (1) he was a member of a regular stevedoring gang, (2) he was subject to being assigned to work on the pier or on navigable waters aboard a vessel on the day of his injury, (3) his work assignment was subject to being changed during the day from the pier to a vessel or vice versa, and (4) without the 1972 Amendments, he would have had a

19. 432 U.S. at 269-270.
20. 432 U.S. at 270-271.
21. 432 U.S. at 273.
22. 432 U.S. at 272.

> non-uniform compensation remedy—the Longshoremen's Act for his work on navigable waters and a State Act for his work on the dock.[23]

In the two cases presently before the Court, the Congressional desire to accommodate the Act to modern cargo handling techniques is not relevant for precisely the same reason the Court held it not relevant to Caputo's case: Caputo was injured while engaged "in the old-fashioned process of putting goods already unloaded from a ship or container into a delivery truck."[24] Ford was injured when engaged in the equally old-fashioned process of securing a military vehicle unloaded from a ship days before to a railroad car for transportation inland, and Bryant was engaged in the old-fashioned process of unloading a bale of cotton from a delivery wagon for storage in the warehouse for five days after which it would be loaded aboard a ship. These cases therefore relate solely to the Court's opinion as to Caputo who was also working with break-bulk cargo.

Unlike Caputo, however, neither Ford nor Bryant was an amphibious worker who did not have a uniform compensation remedy prior to the 1972 Amendments—both had and still have a perfectly uniform compensation system (state law) which covers all of their work activities both before and after the 1972 Amendments. Nor do Ford and Bryant satisfy any of the other three criteria on which the Court relied in holding Caputo to be an amphibious worker for whom Congress desired to provide a uniform compensation system: (1) Neither was a member of a regular stevedoring gang who "participated on either the pier or the ship in the stowage and unloading of cargo." [25] (2) Both were hired as terminal or warehouse laborers and were not subject to being assigned to load or discharge vessels.[26] (3) Both were aware of their work assignments being limited to warehouse work and not subject to being changed during the day.[27] Thus, neither Ford nor Bryant is an amphibious worker like Caputo, but upon remand the Court below obviously did not consider these four factors to be of any significance (since none was present in *Bryant* or *Ford*), and simply adhered to its earlier holding that all work which is "an integral part of the process of moving maritime cargo from ship to land transportation" or vice versa is covered if performed in an area meeting the situs test."[28] Thus, these two cases squarely present the ultimate question which the Court declined to reach in *Caputo*:

> "Whether Congress intended the 1972 Amendments to the Longshoremen's Act to cover 'all physical cargo handling activity anywhere within an area meeting the situs test' or only those 'amphibious workers' such as Caputo who had no uniform compensation remedy prior to the 1972 Amendments?"

23. 432 U.S. at 273-274.

24. 432 U.S. at 271-272.

25. 432 U.S. at 273. Ford: App. pp. 17 (Stip.); 27 (ALJ op. below). Bryant: App. pp. 49 (Stip.); 68-69 (ALJ op. below).

26. 432 U.S. at 273-274. Ford: App. pp. 8, 11 (Stip.); 25, 27 (ALJ op. below). Bryant: App. pp. 48 (Stip.); 69 (ALJ op. below).

27. 432 U.S. at 274. Ford: App. pp. 18 (Stip.); 28 (ALJ op. below). Bryant: App. p. 49 (Stip.); 68 (ALJ op. below).

28. The Court below simply said its prior opinion "was consistent with the rationale" of the Court in *Caputo*. 575 F.2d at 80, Pet. p. 28. Quite to the contrary, the Fifth Circuit position is absolutely inconsistent with the coverage analysis of employee Caputo.

SUMMARY OF ARGUMENT

I.[29]

In *Caputo*,[30] the Court held that a terminal worker engaged in the old-fashioned process of loading a truck with cargo that had previously been unloaded from a vessel met the maritime employment status requirement of the 1972 Amendments to the Longshoremen's Act, because he was a longshoreman by occupation and he was an amphibious worker who was subject to being assigned to work both on navigable waters and on shore on the day of his accident. The Court held such an amphibious worker met the status requirement because he was the type of employee for whom Congress desired to provide a uniform compensation remedy. Ford and Bryant are neither regular longshoremen nor amphibious workers and thus do not meet either *Caputo* criterion. The court below ignored the *Caputo* criteria and adopted the Federal Respondent Director's concept that maritime employment meant any physical tasks performed on the waterfront with respect to maritime cargo.

The maritime employment status requirement, which originally only employers had to meet, was made a requirement which employees also had to meet by the 1972 Amendments. Prior to the passage of the Longshoremen's Act in 1927, decisions of the Court had determined that for workmen's compensation purposes, maritime employment meant work on the navigable waters,[31] and shore-

29. Full argument, *infra*, pages 17 to 30.

30. *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977).

31. *Southern P. Co. v. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

side handling of maritime cargo even during the loading and unloading of a vessel was not maritime employment.[32] Congress effectively adopted this definition of maritime employment in the Act by providing that only those employers "any of whose employees are employed in maritime employment in whole or in part on the navigable waters of the United States" were covered employers.[33] Only three years after the passage of the Act, the Court held a railroad worker was injured while engaged in maritime employment only because a part of his work was on navigable waters,[34] and reaffirmed this holding in 1953 in another railroad worker case.[35]

That Congress intended the term "maritime employment" in the 1972 Amendments to have the same meaning the Court had given it—employment at least a part of which is performed on navigable waters—is clearly confirmed by the legislative history.[36] Under the familiar rule of statutory construction applicable where Congress

32. *State Industrial Commission v. Nordenholt*, 259 U.S. 263 (1922).

33. 33 U.S.C. § 902(4).

34. *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128 (1930).

35. *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953).

36. Both the Senate and House Committee Reports conclude their "shoreside coverage" sections as follows:

> ". . . Likewise, the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters is not covered even if injured on a pier adjoining navigable waters." S. Rep. 92-1125, p. 13; H. Rep. 92-1441, p. 11; 1972 U.S. Code Cong. & Administrative News, p. 4708.

employs words in a statute which have a well known or judicially settled meaning, it is presumed that Congress intended them to have that meaning in the statute.[37]

This definition of maritime employment is required to prevent many dockside railroad workers from being divested of their Federal Employers' Liability Act remedy, as it is clear the Longshoremen's Act is the exclusive remedy of such railroad workers whenever it conflicts with the FELA.[38]

The Court below erroneously looked to the maritime nature of the *cargo* being handled and not to the non-maritime nature of the claimants' *employment*, as defined by the Court and adopted by Congress in the 1972 Amendments, and this error is demonstrated by the last two sentences of the coverage sections of the legislative committee reports. As neither Ford, Bryant, nor any of their co-workers was subject to being assigned by their employer to work on navigable waters on the day of their injuries, they were not amphibious workers and do not have the maritime employment status required of employees by the 1972 Amendments.

II.[39]

A definitive maritime employment status test can be simply stated:

37. *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, at 115 (1939); *Hardy Salt Company v. Southern Pacific Transportation Company*, 501 F.2d 1156, at 1168 (10th Cir. 1974), cert. denied, *sub nom. Sanders Brine Shrimp Co. v. Southern Pacific Transportation Co.*, 419 U.S. 1033 (1974).

38. *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953); *Nogucira v. New York, N.H. & H.R. Co.*, 281 U.S. 128 (1930).

39. Full argument, *infra*, pages 30 to 41.

> On the date of his injury, was the employee subject to being assigned by his employer to perform any part of his work on the navigable waters of the United States?

If answered in the affirmative, the employee is one for whom Congress desired to establish the Longshoremen's Act as his uniform compensation system, whether he was hurt on navigable waters or on an adjoining area ashore. If answered in the negative, the employee had in 1972 and still has a uniform compensation remedy under state law, and Congress did not intend to alter or change that to any extent. This test is fully consistent with the principal criteria of *Caputo*, and provides the amphibious worker with the uniform compensation remedy Congress desired him to have, while leaving the non-amphibious worker ashore with the same uniform remedy he had in 1972 and still has under the state law.

The suggested maritime employment status test can also be easily applied to other work on the waterfront other than the break-bulk cargo handling activities involved in *Caputo*, *Ford* and *Bryant*. Other types of employees, such as ship chandlers or ship suppliers, marine surveyors, ship cleaners, etc., were subject to walking in and out of coverage under the Longshoremen's Act prior to the 1972 Amendments, because a part of their work was done on navigable waters. The Director's proposed test is completely unworkable as to these amphibious workers because none are involved in the physical handling of cargo to or from either water or land transportation. The simple inquiry whether an employee is subject to being assigned to work on navigable waters as well as on an adjoining area determines maritime employment status, whatever his actual work might be at the moment of injury.

III.[40]

Petitioners' suggested maritime employment status test clearly meets the Court's doctrine that the "Act must be liberally construed in accordance with its purpose,"[41] which the court below distorts into its own doctrine that the Act is to be "liberally construed in favor of injured workers."[42] The court below thus advocates that jurisdiction be decided by determining whether the state or the federal act is more favorable to the employee. . .

Petitioners' suggested expression of the status test conforms fully with the Congressional purpose to make the Longshoremen's Act the uniform compensation remedy for amphibious workers like Caputo who prior to the 1972 Amendments were covered by the federal remedy only for that part of their work activity on navigable waters and by a state act for their work activity on land. And the test leaves undisturbed the uniform compensation remedy provided by state law for non-amphibious workers like Ford and Bryant whose work activity is solely on land. The 1972 Amendments should not be construed to extend beyond the specific evil they sought to eliminate, that is, the lack of uniformity of the compensation remedy of amphibious workers only.[43]

The Congressional purpose did not intend to solve the disparity in benefits payable under the state and federal acts as to non-amphibious workers handling potential maritime cargo on an adjoining area as the Federal

40. Full argument, *infra*, pages 41 to 49.

41. *Voris v. Eikel*, 346 U.S. 328, at 333 (1953).

42. 539 F.2d at 541, Pet. p. 42.

43. *Cf. United States v. Champlin Refining Co.*, 341 U.S. 290, at 297 (1951).

Respondent Director proposes. The introduction of various bills starting in 1973 to correct this general inadequacy, not just on the waterfront, but throughout the country, by requiring the state acts to meet certain benefit standards demonstrates this.

Petitioners' suggested maritime employment status test is as liberal an interpretation of the 1972 Amendments as the Congressional purpose will permit. Both administrative law judges below found that liberality or generosity should not distort the Congressional purpose. The presumption of coverage in the Longshoremen's Act plays no part in cases such as these in which substantial evidence has been presented to the fact finder.[44] No deference to the decisions of the Benefits Review Board is owed by the federal judiciary in these cases of statutory interpretation of the jurisdictional provisions of the Act, as is demonstrated by this Court's detailed treatment of the jurisdiction issue in *Caputo*. The opinion of the court below should be reversed and these claims dismissed for want of federal coverage.

ARGUMENT

Introduction

The present cases involving break-bulk cargo come to the Court for resolution in light of *Caputo*. Leaving aside the *Blundo* containerization analysis as irrelevant, 432 U.S. at 271-272, *Caputo* held that a worker who was a longshoreman by occupation would be covered by the Longshoremen's Act even while loading cargo from a storage point to land transportation on a covered situs, provided the worker was subject to being assigned by his

44. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

employer on the date of his injury to work both aboard vessels and ashore. The elements looked to by the Court in determining that he was a longshoreman by occupation were membership in a regular stevedoring gang which loaded and unloaded vessels, uncertainty as to whether one's duties on any given day would be aboard a vessel or on the docks, and the potential to be assigned to work both on a vessel and on the dock on the same day. None of these factors is present in the *Ford* and *Bryant* cases, as is recognized by the Federal Respondent in conceding that neither Ford nor Bryant was a longshoreman by occupation.[45] The clearly focused issue is whether persons such as Ford and Bryant, who are not longshoremen by occupation, but who are in an area adjoining navigable waters and engaged in loading or unloading land transportation, were intended by Congress to be covered by the Longshoremen's Act as extended ashore by the 1972 Amendments. The statutory language and the legislative history indicate that these additional categories of workers who had in 1972, and still have, a uniform compensation system were not intended to be covered, and the following considerations clearly demonstrate that Congress intended to extend Longshoremen's Act coverage ashore only to those workers "who, without the 1972 Amendments, would be covered for only part of their activity."[46]

45. Memorandum for Federal Respondent, No. 78-425, pp. 4, 5.

46. 432 U.S. at 273. Without the 1972 Amendments an "amphibious worker" employed as a member of a gang of longshoremen to load or unload a vessel would be covered only for that part of his work performed while on the navigable waters of the United States aboard a vessel, and would be covered by a state workmen's compensation act for that part of his work performed while ashore on the dock, inside the warehouse, etc. After many years of litigation this jurisdictional line was finally clearly drawn at the water's edge in *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969).

WHAT IS "MARITIME EMPLOYMENT" UNDER THE LONGSHOREMEN'S ACT?

The statutory language which creates the "status" requirement occurs in the definition of the term "employee":

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations. * * * " 33 U.S.C. § 902(3).

Much of the judicial verbiage expended on the 1972 Amendments has directed itself to the words "longshoreman" or "longshoring operations", but the basic category which creates the status requirement is "maritime employment." This same term—"maritime employment"—has been present in the Longshoremen's Act in the definition of the term "employer" since its original enactment in 1927.[47]

The Federal Respondent Director asserted in *Caputo* and reasserted in its Memorandum on the present Petition for Certiorari in these cases that

> "Maritime employment . . . includes all physical tasks performed on the waterfront, and particularly those tasks necessary to transfer cargo between land and water transportation." 432 U.S. at 272; Memorandum, at 3, 4.

As the Court recognized in *Caputo*,[48] the 1972 Congressional Committee Reports make it clear that the Director's cover-the-waterfront position is untenable when they state that ". . . employees whose responsibility is only

47. Cf: *Caputo, supra*, 432 U.S. at 264.

48. 432 U.S. at 267.

to pick up stored cargo for further transshipment would not be covered . . ."[49] The Court quite properly concluded that the truck driver who was engaged with Caputo "in the old-fashioned process of putting goods already unloaded from a ship or container into a delivery truck" did not meet the maritime employment status test for coverage, although he obviously met the situs test if Caputo did.

Thus, the Director's contention that all physical tasks performed on the waterfront necessary to transfer cargo between land and water transportation are "maritime employment" within the meaning of the Act is completely unsupportable, for there can be no question that the truck driver was engaged in the same physical tasks on the waterfront as was Caputo.

At the oral argument in *Caputo,* having first verified that there was no definition of the term "maritime employment" in the Act itself, Mr. Justice Rehnquist then inquired whether there was a definition by which the Court could be guided. Unfortunately, this question was not fully answered, and the Court is confronted with this same question once again.[50] The definition by which the Court not only can, but should, be guided is found (1)

49. S. Rep. 92-1125, p. 13; H. Rep. 92-1441, p. 11; 1972 U.S. Code Cong. and Administrative News, p. 4708.

50. Counsel for the Petitioners herein filed a Brief Amicus Curiae on behalf of the West Gulf Maritime Association (of which both Petitioners are members) in *Caputo* in which the Court's attention was directed to these prior decisions and these two sentences of the legislative history. While the Court did not refer to them in the context of a definition in *Caputo,* one of the key factors, if not the principal factor, in this Court's holding that *Caputo* met the maritime employment status test—that he was subject to being asisgned to work both on navigable waters and on the pier on the date of his accident—is fully supported by these prior decisions and the legislative history.

in the prior decisions of the Court determining what constitutes maritime employment for workmen's compensation purposes and (2) in the last two sentences of the 1972 Committee Reports relating to the extension of jurisdiction ashore, which clearly and unmistakably demonstrate that Congress did not intend to change the definition of the term "maritime employment" in its 1972 Amendments to the Act insofar as break-bulk cargo operations are concerned.

The prior decisions of this Court reveal an historical definition or understanding of the term "maritime employment." Until the Court's decision in *State Industrial Commission v. Nordenholt Corp.,* 259 U.S. 263 (1922), the courts of the State of New York had repeatedly held that in the context of a state workmen's compensation law, shoreside handling of maritime cargo during the loading and unloading of a vessel was "maritime employment," and the Constitutional exclusivity of the Federal admiralty and maritime jurisdiction therefore precluded the application of a state workmen's compensation law to such shoreside maritime cargo handling activity.[51] The New York Supreme Court had based its holdings on *Southern P. Co. v. Jensen,* 244 U.S. 205 (1917) and *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920), in which this Court held that longshoremen injured aboard vessels were within the exclusive Federal admiralty and maritime jurisdiction, and their employment under a maritime contract to load or unload a vessel was maritime employment. The New York court had concluded that any physical task involved in the loading and unloading

51. *Keater v. Rock Plaster Mfg. Co.,* 224 N.Y. 540, 120 N.E. 56 (1918). *Anderson v. Johnson Lighterage Co.,* 224 N.Y. 539, 120 N.E. 55 (1918). *Newman v. Chile Exploration Co.,* 232 N.Y. 37, 133 N.E. 120 (1921).

of a vessel whether on the dock or on the vessel was therefore maritime employment. In *Nordenholt* this Court stated the New York courts had "proceeded upon an erroneous view of the Federal law,"[52] and held that dockside maritime cargo handling activities, even those directly involved in loading and unloading a vessel, were not "maritime employment," that such employment was not within the exclusive admiralty and maritime jurisdiction of the United States, and that such work ashore was within the jurisdiction of the state's workmen's compensation laws.

As the Court recognized in *Caputo,* the *Jensen* and *Nordenholt* cases left to the exclusive admiralty and maritime jurisdiction of the United States only those injuries occurring on the seaward side of the pier, and after two Congressional attempts to authorize states to apply their own compensation statutes to injuries sustained in maritime employment on navigable waters, Congress passed the Longshoremen's Act in 1927. 432 U.S. at 256. In the Act as originally passed, Congress expressly provided that only those employers "any of whose employees are employed in maritime employment, in whole or in part on the navigable waters of the United States (including any dry dock)," were covered.[53] Thus, Congress in 1927 effectively adopted the *Jensen-Nordenholt* definition of maritime employment for workmen's compensation purposes—only work performed on navigable waters is maritime employment, and that performed on the dock is not.[54]

52. 259 U.S. at 272.

53. 33 U.S.C. § 902(4).

54. *Nacirema Operating Co. v. Johnson,* 396 U.S. 212 (1969).

It took only three years for the Court to be confronted for the first time with the meaning of the term "maritime employment" as used in the Longshoremen's Act. In *Nogueira v. New York, N.H. & H.R. Co.,* 281 U.S. 128 (1930), this Court held that a railroad worker loading freight into railroad cars on a car float was in "maritime employment" within the meaning of the Act only because a part of his work on the day of the accident was on the navigable waters of the East River in New York Harbor. In so doing the Court expressly reaffirmed its holding in *Nordenholt* that work performed on a dock in unloading a vessel was not maritime employment, and therefore not covered by the Longshoremen's Act.[55]

Some 23 years later yet another railroad worker was before the Court asserting that he was not engaged in "maritime employment" within the meaning of the Act when he was injured aboard a car float on navigable waters while performing his duties as a railroad brakeman. *Pennsylvania R.R. Co. v. O'Rourke,* 344 U.S. 334 (1953). Indeed, O'Rourke had persuaded the Court of Appeals for the Second Circuit that his railroad brakeman's duties were sufficiently different from those of the railroad worker in *Nogueira* to make him not engaged in maritime employment. In resolving the conflict

55. 281 U.S. at 133. The Court said in part:

"In State Industrial Commission v. Nordenholt Corp., 259 U.S. 263, 66 L.Ed. 933, 25 A.L.R. 1013, 42 Sup. Ct. Rep. 473, 21 N.C.C.A. 862, a longshoreman was injured on a dock while engaged in unloading a vessel. It was decided that in such a case, where the injury took place on an extension of the land, the maritime law did not prescribe the liability and the local law had always governed. The Workmen's Compensation Law of the State was accordingly held to be applicable. The distinction was thus maintained between injuries on land and those which were suffered by persons engaged in maritime employment on a vessel in navigable waters."

thus created by the Second Circuit with its opinion in *Nogueira*, the Court expressly reaffirmed that maritime employment as the term is used in the Longshoremen's Act means that employment which is performed on navigable waters, saying in part:

> "Whether the injury occurred to an employee loading freight into cars on the float, as in the Nogueira case, or to one like respondent moving loaded cars from a float could make no difference. Both employments are maritime. See Nogueira v. New York, N.H. & H.R. Co., supra (281 U.S. at 134)." 344 U.S. at 339, 340.[56]

Both Nogueira and O'Rourke sought to avoid being held to be engaged in "maritime employment" within the meaning of the Act, as they preferred what were then the more liberal benefits afforded railroad workers who could recover damages under the Federal Employers Liability Act. However, these men having been injured on a covered situs, the Court properly held in both cases that their exclusive remedy was under the Longshoremen's Act.[57]

Thus at the time the 1972 Amendments to the Act were passed, the Court's prior decisions had established that the term maritime employment as used in the Act meant that work at least a part of which was performed on navigable waters.

That the Congress intended the term maritime employment to have the same meaning after the 1972

56. Mr. Justice Minton's opinion for the four dissenting justices emphasizes that the question at issue was the meaning of "maritime employment," and that the key factor was employment "over navigable waters." 344 U.S. at 342-343 (dissenting opinion).

57. Cf: 33 U.S.C. § 905(a).

Amendments as to break-bulk cargo, and that wholly dockside work is still not to be considered maritime employment under the Act, is clearly stated in the last two sentences of the Extension of Coverage to Shoreside Areas sections in both the Senate and House Committee Reports:[58]

> ". . . Likewise, the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters is not covered even if injured on a pier adjoining navigable waters."[59]

58. S. Rep. 92-1125, p. 13; H. Rep. 92-1441, p. 11; 1972 U.S. Code Cong. and Administrative News, p. 4708.

59. The Court recognized in *Caputo* that Congress broadened "the definition of navigable waters of the United States". 432 U.S. at 263. These two sentences also make it clear that in broadening "the definition of navigable waters of the United States" to include adjoining shoreside areas, Congress was doing so as to the situs requirement only. Had it intended for all physical cargo handling activities on such adjoining areas to satisfy the maritime employment requirement, it never would have included these two sentences, nor specifically excluded such adjoining area workers as the consignee's truck driver who physically handled the same cargo as *Caputo*. Nor would it have made the maritime employment requirement which prior to the 1972 Amendments had applied only to employers applicable to the employees as well. Without the maritime employment requirement added for employees, the broadened definition of navigable waters relating to situs was all that would have been necessary to extend coverage to Caputo, Ford and Bryant for their injuries ashore in an adjoining area. It is the added requirement of maritime employment—being subject to assignment to work in part on navigable waters—which extends the Act's jurisdiction to Caputo, but not to Ford and Bryant. Cf. *Weyerhauser Company v. Gilmore*, 528 F.2d 957, 960 (9th Cir. 1976), *cert. denied*, 429 U.S. 868 (1976).

In these two statements, the Congressional Committees have made it clear that an employer is not engaged in "maritime employment" if none of his employees work, in whole or in part, on navigable waters, even if his employees work on and are injured on an area adjoining navigable waters. Thus, the historical concept first articulated in *Nordenholt*, that shoreside handling of maritime cargo is not maritime employment for workers' compensation purposes was expressly adopted by the Congressional Committees in 1972. In terms of the immediate problem of determining whether the Longshoremen's Act reaches Ford and Bryant, it is clear that these two workers cannot meet the historical definition of maritime employment. Caputo and Blundo, on the other hand, both were subject to assignment on navigable waters at the time of their injuries, and their work on the date of their injury may thus be recognized as maritime employment under the historical definition. The court below, however, rather than focusing on maritime *employment*, looked to the handling of maritime *cargo*, holding that any worker handling water-borne cargo is covered by the Longshoremen's Act if injured in an area adjoining navigable waters. The court below did not address itself to the historical definition of the term or to the last two sentences of the legislative history.[60]

60. The Court below considered *O'Rourke* "scattered dicta" on the maritime employment requirement, 539 F.2d at 539 n. 12, Pet. pp. 37-38, and overlooked the Court's reaffirmation of the *Jensen-Nordenholt-Nogueira* meaning of maritime employment for workmen's compensation purposes. This reaffirmation by the Court of the meaning of "maritime employment" in the Act is frequently overlooked, because the Court in *O'Rourke* also made it clear that only the employer was required to meet the "maritime employment" test in that pre-1972 Amendments case, and held that even if O'Rourke himself could be labeled as only a railroad worker, the railroad was still an employer under the Act because it had other employees who

In addition to the foregoing expression by the Congressional Committees of the meaning of the "maritime employment" concept, a familiar rule of statutory construction dictates that,

> "When Congress uses words in a statute without defining them, and those words have a judicially settled meaning, it is presumed that Congress intended them to have that meaning in the statute."[61]

Thus "maritime employment" as interpreted by *Nordenholt, Nogueira* and *O'Rourke* may be seen to have been adopted by the Congress when it reused the phrase in the 1972 Amendments, especially in view of the last two sentences of the Committee Reports, as discussed above.

As *Caputo* holds, however, after the 1972 Amendments the employee as well as the employer must be "engaged in maritime employment" and the injury must occur on a covered situs either afloat or ashore to come within the Act's expanded jurisdiction. Thus, as those last two sentences of the Committee Report's section on coverage clearly indicate, an employee who is not subject to working in whole or in part on navigable waters does not meet the maritime employment require-

satisfied the "maritime employment" requirement in the Act's definition of an employer. Once again, however, those other railroad employees who made the railroad an employer were found to be engaged in "maritime employment" only because a part of their work was performed upon navigable waters, as is emphasized by the dissenting opinion in *O'Rourke*, 344 U.S. at 342.

61. *Hardy Salt Company v. Southern Pacific Transportation Company*, 501 F.2d 1156, 1168 (10th Cir. 1974), *cert. denied sub nom. Sanders Brine Shrimp Co. v. Southern Pacific Transportation Co.*, 419 U.S. 1033 (1974). The same principle is expressed by this Court in *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 115 (1939).

ment for the same reason that an employer does not meet it who has no employees who work, in whole or in part, on navigable waters.[62] It is undisputed that neither Ford nor Bryant can meet the historical definition of maritime employment, which the Congress adopted in passing the 1972 Amendments. Neither of them was subject to being assigned to work, in whole or in part, aboard a vessel on navigable waters on the date of his injury. App. pp. 10, 48. Bryant had not been subject to such a waterborne assignment and had done no work on navigable waters for five or six years prior to his injury. App. p. 49.

The use of the historical definition of maritime employment under the Longshoremen's Act is further mandated by the fact that at least as to railroad workers within its jurisdiction, the Longshoremen's Act is exclusive of all other employee's remedies against an employer. Both *Nogueira* and *O'Rourke,* in which this historical definition was reaffirmed by the Court, expressly held that railroad employees who were injured aboard a car float on navigable waters had the Longshoremen's Act as their exclusive remedy against their railroad employer.

62. As Petitioners both had other employees who worked in part on navigable waters, both satisfied the maritime employment requirement for employers. Bryant's employer, Ayers Steamship Company, served as local agent for vessels in the Port of Galveston and therefore had employees who would go aboard vessels to assist the Master in clearing customs, immigration, etc. on arrival and in other ways while the vessel was in port. But Bryant's employer had no longshoring operations of any kind and did not load or unload any vessels, even those for which they provided other agency services. App. pp. 49, 50. Ford's employer, P. C. Pfeiffer, Inc., also served as local agent for vessels, had a warehouse division by whom Ford was employed at the time of his injury, whose work was entirely ashore, and a stevedoring division which loaded and unloaded vessels. App. p. 8.

If the position of the Director—all physical tasks on the waterfront—is adopted, this exclusivity of the Longshoremen's Act divests many dockside railroad workers of their FELA remedy, a result wholly unconsidered and unintended by the Congress. This result has been avoided in two recent cases by holding that such railroad employees are not in maritime employment even though assisting in transferring cargo between land transportation and a ship. *Conti v. Norfolk & Western Railway Company,* 566 F.2d 890 (4th Cir. 1977); *White v. Norfolk & Western Railway Company,* 232 S.E.2d 807 (Va. 1977), cert den'd, 434 U.S. 860 (1977). It was clear to these courts that the employees were engaged in unloading railroad trains, rather than loading ships, as they assisted in removing cargo from railroad cars in a shoreside terminal area onto conveyor systems which took it to the vessel for loading.[63] From this viewpoint, it is equally clear that Ford was loading a railroad car, and Bryant was unloading a cotton wagon, even though the cargo they were handling was originally or eventually waterborne.

Clearly the Fourth Circuit in *Conti* and the Supreme Court of Virginia in *White* were looking to whether or not the *employment* was maritime, rather than to whether the *cargo* was maritime. This same approach was adopted by the United States Court of Appeals for the Ninth Circuit in *Cargill, Inc. v. Powell,* 573 F.2d 561 (9th Cir. 1977), petition for cert. pending. In *Powell,* a marine terminal employee whose occupation for seven months had been unloading railroad cars at a shoreside grain

63. White was in fact an electrician rather than an operator or car handler, but his work appears to fit the type of maintenance work elsewhere held to be inherently a part of the cargo handling function.

elevator was held not to meet the maritime employment requirement. Again, the court was looking to the worker's non-maritime *employment* rather than to the maritime nature of the *cargo* being handled. This emphasis on employment is clearly the same emphasis used by the Congressional Committees in the last two sentences of their reports, as quoted above. The court below ignored this legislative explanation of the maritime employment concept, just as it ignored this Court's enumeration of the elements of a maritime occupation in *Caputo* when the present cases were remanded for reconsideration. The failure to give careful consideration to the Congressional intention and to the implications of an over-broad approach led the court below to the relatively easier, "liberal construction" approach which intrudes the federal compensation remedy into employer-employee relationships far beyond the shoreward extension actually considered by the Congress in 1972, as *Conti, White* and *Powell* graphically demonstrate.

A DEFINITIVE MARITIME EMPLOYMENT STATUS TEST

If the foregoing does nothing else, it demonstrates quite clearly that the Court should try to establish a definitive maritime employment status test—one that is simple and easy to apply uniformly throughout the country and that will resolve substantially all status questions at least as to break-bulk operations. Petitioners respectfully submit that as to break bulk cargo operations such as those involved in *Caputo, Ford,* and *Bryant,* such a maritime employment test can be simply stated:

> On the date of his injury, was the employee subject to being assigned by his employer to perform any part of his work on the navigable waters of the United States?[64]

If this question is answered in the affirmative, he meets the status requirement, because he is "someone like Caputo," 432 U.S. at 273, who prior to the 1972 Amendments would have been covered by the Longshoremen's Act for only the part of his work which was on navigable waters and by a state workmen's compensation act for his work on the adjoining area shore. It was only to such an employee that Congress intended to provide a uniform compensation remedy under the Longshoremen's Act and thus eliminate having his compensation remedy, whether State or Federal, determined by the "fortuitous circumstance of whether the injury occurred on land or over water."[65]

If this maritime employment status test is answered in the negative, he is not covered by the 1972 Amend-

---

64. This test is so simple and easy of uniform application that counsel has some concern that its simplicity may be an even bigger obstacle to its acceptance by the Court than the basic reluctance most courts seem to have to accept any such suggested test from counsel in a case. It could be phrased more in keeping with the language of *Caputo,* but with the same meaning, as follows:

> On the day of his injury, was the employed subject to being assigned by his employer to work both on navigable waters and on an adjoining area ashore?

This language is suggested by this portion of the Court's opinion in *Caputo*:

> "Thus, had Caputo avoided injury and completed loading the consignee's truck on the day of the accident, he then could have been assigned to unload a lighter. Id., at 24. Since it is clear that he would have been covered while unloading such a vessel, to exclude him from the Act's coverage in the morning but include him in the afternoon would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate." 432 U.S. at 274.

65. S. Rep. 92-1125, p. 13; H. Rep. 92-1441, p. 10; 1972 U.S. Code Cong. and Administrative News, p. 4708.

ments and he still has the same uniform compensation system under state law after the 1972 Amendments as he had before them—a uniform system Congress did not intend to disturb.[66]

This maritime employment status test not only conforms to the historical definition in the Court's prior cases as adopted by Congress in the last two sentences of the legislative history, it is also fully consistent with the principal criteria of *Caputo*. The Court held Caputo covered while engaged in the old-fashioned process of loading a truck for two reasons:

1. He was a member of a regular stevedoring gang and therefore a longshoremen by occupation, and
2. On the date of the injury he was subject to being assigned by his employer to work on the navigable waters as well as on an adjoining area ashore.

As we read *Caputo*, the fact that he was a regular longshoreman standing alone would not have carried the day for him; for example, if he were doing the purely clerical work expressly excluded from coverage in the Committee Reports and had not been subject to assignment to work aboard vessels on the date of his injury, he would not have been subject to the shifting and fortuitous coverage Congress intended to eliminate.

From what we have said previously, and the foregoing suggested maritime employment status test, it is obvious that Petitioners believe the most significant of

66. Please see discussion *infra* at n. 78, p. 44.

these two reasons is the one which made Caputo the type of amphibious worker for whom Congress desired to provide a uniform compensation system after the 1972 Amendments. It was the potential of being assigned to work both on a vessel and ashore on the date of his accident which exposed Caputo to the very evil which Congress intended to correct—walking in and out of coverage under the Longshoremen's Act in the course of his work day.

We suggest the Court reconsider the apparent significance which it attached to Caputo's occupation as a longshoreman. We believe the facts of the *Ford* case graphically demonstrate the many problems posed by such a "longshoreman by occupation" criterion.[67] It is conceded that Ford was not a longshoreman by occupation even though during the year immediately prior to his injury on the railroad car, he had worked a total of seven days in loading and unloading vessels, and therefore would have been covered prior to the 1972 Amendments for those portions of his activities on those seven days while aboard a vessel upon navigable waters. Petitioners believe it is clear Congress intended for him to be covered by the 1972 Amendments while so engaged in such indisputably longshoring operations, whether his work in those long-

67. The stipulated facts show that Ford drove a beer truck during a part of the year immediately prior to his injury in addition to his work as a construction worker, as a longshoreman for seven days, and as a warehouseman for some 39 days. App. p. 17. If while driving the beer truck Ford had been required by his employer to pick up some beer being imported from Germany and to help a warehouseman in a pier-side warehouse to load the cases of beer onto his truck, he would have been the equivalent of the truck driver in *Caputo* and clearly would not have been covered under the Longshoremen's Act even if he had worked enough in indisputably longshoring operations in that same year to cause the Court to say he was a longshoreman by occupation.

shoring operations was performed on the vessel or on an adjoining area. He may be recognized as an "other person engaged in longshoring operations" on those seven days. 33 U.S.C. § 902(3). The fact that all of his work may have been performed on those seven days entirely ashore in an adjoining area, and none upon navigable waters aboard a vessel is of no significance—Congress intended for him to be covered while working ashore after the 1972 Amendments because he had the potential to walk in and out of the coverage of the Longshoremen's Act during the course of a day's work at the direction of his employer. On those days he was an "amphibious worker" for whom Congress desired to provide a uniform compensation system. If this potential assignment to work both on navigable waters and on an adjoining area is the basis for the maritime employment status test, it completely solves the jurisdictional problem insofar as all employees are concerned whether they are longshoremen by occupation like Caputo or not. If, however, the Court also recognizes a separate longshoreman by occupation test, rather than recognizing "longshoreman" as shorthand for "subject to assignment aboard ship," the problem of determining how many days or weeks or months a year an employee like Ford must work to meet this "longshoreman by occupation" criterion will require years of litigation to resolve.

The *Powell* case from the Ninth Circuit, presently pending on certiorari, further illustrates this problem.[68] Apparently Powell had been a longshoreman by occupation until he went to work at Cargill's grain elavator some seven months before his injury. For this seven

68. *Cargill, Inc. v. Powell*, 573 F.2d 561 (9th Cir. 1977), petition for cert. pending, No. 77-1543.

months, Powell "had no involvement whatsoever with the loading and unloading of the ships themselves," 573 F.2d at 564, and in fact could not have been such an amphibious worker for, like Bryant's situation here, all of this work was done by independent stevedoring companies and not Cargill. While he had not pursued his former occupation as a longshoreman for seven months, the Federal Respondent's Memorandum on the Petition for Certiorari in these cases asserts that Powell was still a longshoreman by occupation at the time he was hurt unloading a railroad car at the grain elevator.[69] How many more weeks or months would it be before he would no longer be considered a longshoreman by occupation by the Federal Respondent?

We do not believe the Court intended to hold that since Caputo was a longshoreman by occupation that this alone was sufficient to afford him coverage under the Longshoremen's Act at any time he was injured on a covered situs, nor we respectfully submit could it have done so in view of the legislative history. For example, assume that Caputo had started moonlighting at different jobs. Assume that one such job was as driver of a consignee's truck which required him to pick up cargo at the dock for further transshipment, and actively to help to load the consignee's truck as in the *Caputo* case. As the Court has recognized, the legislative history states categorically that such a truck driver is not intended to be covered by the extension of the Act's jurisdiction ashore in the 1972 Amendments. Thus, we submit, under those circumstances whether Caputo is a longshoreman

69. Memorandum for Federal Respondent in No. 77-1543, pp. 3-4.

by occupation and is moonlighting as a consignee's truck driver or whether he is a full time truck driver employee of the consignee, he would not be covered by the 1972 Amendments and Congress clearly so indicated in the legislative history.[70]

We respectfully submit that the maritime employment status test which Congress intended to be applied, and which has been adopted at least in part by the Court in *Caputo* as to break bulk cargo operations is simply:

> Whether the employee on the date of his injury is subject to being assigned by his employer to perform any part of his work on navigable waters?

If so, Congress wanted to provide him with a uniform compensation system—the same one that he had for only that part of his work which was done on navigable waters prior to the 1972 Amendments.

We respectfully submit that this is the only approach which gives full meaning to everything that Congress said both in the statute and in those portions of the Committee Reports dealing with the Extension of Coverage to Shoreside Areas.

---

70. While it may be unlikely that longshoremen like Caputo himself would have to moonlight, there are many workers with other full time occupations who moonlight as longshoremen at night and on weekends who could never meet the longshoreman by occupation criterion, yet they were clearly covered by the Longshoremen's Act while working on navigable waters prior to the 1972 Amendments and obviously Congress intended such moonlighting amphibious workers to be covered if injured ashore while engaged in longshoring operations after the 1972 Amendments. An employee's regular occupation is not the standard—it is rather his status as an amphibious worker who, prior to the 1972 Amendments, did not have a uniform compensation system while working on the waterfront, which nonuniformity Congress intended to correct by the 1972 Amendments.

WILL THE SUGGESTED MARITIME EMPLOYMENT STATUS TEST WORK OTHER THAN IN BREAK-BULK CARGO HANDLING ACTIVITIES?

As the Court correctly concluded in *Caputo,* modern cargo handling techniques such as containers were singled out by Congress for special treatment as to injuries ashore, because the loading and unloading of many break-bulk cargoes by longshoremen in the holds of vessels on navigable waters had been moved ashore and become the stuffing and stripping of containers, the "modern substitute for the hold[s] of the vessel." 432 U.S. at 270.

Leaving containers and other such modern cargo handling techniques aside,[71] the maritime employment status test which Petitioners suggest will answer most, if not all, questions as to the maritime employment status

---

71. Petitioners believe this Court properly perceived the two dominant themes and purposes of the Congress in extending the Act's jurisdiction ashore, and particularly in recognizing that the considerations for the movement ashore as to modern cargo handling techniques such as containerization were completely different from those relating to break bulk cargo operations. As to containers, Congress intended to include the stuffing and stripping of containers ashore as this was the functional equivalent of the work done prior to this modern cargo handling technique by longshoremen upon the navigable waters of the United States. Thus, as this Court correctly perceived, Congress did not intend for shipowners or stevedoring companies to be able to avoid the more liberal compensation benefits of the Longshoremen's Act by the expediency of moving maritime employment activities from the vessel onto the dock by employing containers. The point of rest argument, as articulated by Petitioners in the court below and rejected by this Court in *Caputo,* 432 U.S. at 274-276, failed to recognize that persons "like Caputo" could work on either side of that point in the course of their employment. The standard of maritime employment for which reaffirmation is sought in the present case is not subject to that weakness, however, for by definition it provides a uniform remedy to all those otherwise covered by the Act for part of their activity.

of employees as readily as it answered the maritime employment status of employers prior to the 1972 Amendments.[72]

A few specific examples of other types of employees who were covered for a part of their work activities prior to the 1972 Amendments and thus were subject to walking in and out of the coverage of the Longshoremen's Act during the course of a single work day will graphically illustrate the ease with which the suggested status test can be applied. In considering these examples, contrast the Director's proposed definition of maritime employment which is completely unworkable as to these employees as none involves the physical handling of cargo to or from land transportation:

1. Ship Chandlers or Ship Suppliers—men or women who go aboard vessels on the navigable waters of the United States to either sell or deliver ships' supplies or in some instances to sell or deliver clothing purchased by members of a vessel's crew.
2. Marine Surveyors—People who go aboard vessels and on the docks to inspect the condition of a vessel, before the loading or unloading of cargo, after cargo operations have been completed, or to ascertain the nature and extent of damages which may have been sustained by a vessel in collision or by cargo in the course of

72. The 45 years which the Court spent "trying to ascertain the respective spheres of coverage of the State and Federal systems," 432 U.S. at 259, did not really involve this question as to employers after this Court's decision in 1930 in *Noguiera*, 281 U.S. 128 (1930), discussed above at page 23. The problems involved related to employees and to the situs of injuries, rather than to the maritime employment requirement for employers.

its loading and/or unloading and/or transit by the vessel.

3. Ship Cleaners—particularly used in connection with vessels carrying petroleum products—are employed by companies specializing in the clean- of tanks and/or other cargo compartments, whose employees must work both aboard a vessel and on the adjoining dock area.

If injured on a covered situs ashore or afloat, the simple maritime employment status test is quickly answered as to these waterfront employees in the affirmative —all are subject to being assigned to perform a part of their work on navigable waters. All are subject to the very evil Congress tried to eliminate—a shifting, fortuitous and non-uniform compensation system prior to the 1972 Amendments.[73]

73. While not intended to be either exhaustive or exhausting, several other examples are:

1. Steamship Agents (like Bryant's employer here)—People who board vessels upon their arrival in port who are employed by the vessels' owners to perform whatever shoreside services might be needed other than longshoring, and to otherwise assist the Master of the vessel while it is in port.
2. Drivers of laundry trucks who pick up from vessels upon their arrival in port any laundry or cleaning of ships' linens or crews' clothing and effects, and thereafter return them aboard the vessel.
3. Line Handlers—People who assist a vessel in tying up to the dock by handling its mooring lines on the dock and/or on the water when it is necessary to reach mooring dolphins by small boats.
4. Fumigators—People employed to fumigate cargoes such as grain, a part of whose work requires them to be both aboard the vessel and on the adjoining dock area.
5. Marine Petroleum Inspectors—Men who are hired to ascertain the condition of a vessel's cargo tanks prior to loading, to sample the petroleum cargoes in both the shoreside tanks from which the cargo is loaded aboard the vessel or into which it is discharged from the vessel, and thereafter to certify the quality

In rejecting the point of rest theory in *Caputo*, the Court was not convinced it was a "workable definition" of maritime employment because the point of rest varies from port to port and with different types of cargo, and because the "point can be moved seaward or landward at the whim of the employer". 432 U.S. at 276 n. 38. Precisely the same problems exist with the Director's proposed definition. But whether an employee is subject to being assigned to work in part on navigable waters and in part ashore does not present such problems, as *Caputo*, *Ford* and *Bryant* demonstrate—maritime employment status follows from his being an amphibious worker, whatever his actual assignment at the moment of injury.

---

loaded aboard or discharged from the vessel by reference to information developed by them both at the storage tanks ashore and from the vessel's tanks themselves.

6. Gangway Guards—People employed to serve as gangway guards or gangway watchmen while a vessel is in port for security purposes, a part of whose duties are performed on the vessel and a part on the adjoining dock.
7. Marine Investigators and/or Insurance Adjusters—People who are engaged in investigating various marine casualties and damage claims both to the vessel, its cargo, its personnel and others who work aboard it, these people perform a part of their activities on the navigable waters of the United States and a part on adjoining areas.
8. Union Patrolmen or Representatives—Officials of various maritime labor unions representing not only masters, engineers and the unlicensed crew of vessels, but also longshoremen or ship builders or ship repairers, a part of whose duties are performed aboard vessels and a part on adjoining areas.
9. Last but not least, maritime attorneys whose work frequently requires them to board vessels to interview witnesses, obtain photographs of the vessel and the surrounding dock area, etc., in connection with all types of maritime claims which might be made against the vessel, the stevedore or others, a part of whose activities are upon the navigable waters of the United States and a part on the adjoining dock area.

DOES THE SUGGESTED MARITIME EMPLOYMENT STATUS TEST MEET THE COURT'S LIBERAL CONSTRUCTION DOCTRINE FOR REMEDIAL LEGISLATION?

Lead Counsel for Petitioners, having been on the brief on the losing side,[74] remembers all too well this Court's statement of this doctrine in *Voris v. Eikel*, 346 U.S. 328 (1953). However, this Court's *Voris v. Eikel* language is seriously distorted by the court below. Contrast the following statements:

This Court:	Fifth Circuit:
Voris v. Eikel, 346 U.S. at 333, "This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results."	*Perdue*, 539 F.2d at 541, Pet. p. 42, "In deciding each appeal, we must remember that the Act is to be liberally construed in favor of injured workers, * * *."

Voris v. Eikel dealt with the duties imposed by the Act on an illiterate, uninstructed employee clearly included within its coverage and held that a technical notice requirement should not bar the claim where the employer had constructive if not actual knowledge of the employee's injury. In the present cases the court below was dealing with the choice between two remedies, state or federal, with the question being the degree of expansion of the

---

74. Counsel cannot refrain from noting that at least two of the attorneys involved in that case on opposite sides went on to substantially better things with the winner still on top: on the brief for the winning side was "Assistant Attorney General Warren E. Burger," and arguing the cause on the losing side was "John R. Brown, of Houston, Texas" whom the Court will recognize as the present Chief Judge of the Court of Appeals for the Fifth Circuit.

federal coverage or jurisdiction. Considering that federal jurisdiction is by definition limited rather than plenary, the distinction between the issue in the present cases and that in *Voris v. Eikel* is readily apparent. This Court's admonition in favor of liberal construction in conformance with the Act's purpose does not mandate a broad expansion of federal jurisdiction. Both Administrative Law Judges below recognize this Court's maxim, but both found that liberal construction principles should not be employed in furtherance of federal expansionism and in frustration of the Congressional purpose. *Ford,* App. p. 39; *Bryant,* App. p. 91.

The Fifth Circuit's distorted version of the liberal construction maxim is in the context of these jurisdiction cases an uncertain tool. If in a given case state coverage would be more beneficial to the claimant, the Fifth Circuit approach would then restrict federal jurisdiction.[75] In the context of Longshoremen's Act jurisdiction, this Court has rejected the concept of attempting to maximize or minimize the jurisdiction criterion, for the reason that the resulting uncertainty is inconsistent with the Congressional purpose. *Calbeck v. Travellers Insurance Co.,* 370 U.S. 114, 125-126 (1962). The Fifth Circuit's maximization of liberality is equally uncertain as a jurisdictional criterion and should be rejected as an obvious distortion of this Court's principle of liberal construction. *Voris v. Eikel, supra.*

Petitioners' suggested maritime employment status test clearly meets this doctrine—it conforms fully with the Congressional purpose in a way which avoids harsh and

75. *E.g.,* if state benefits exceeded the federal maximum, 33 U.S.C. § 906, or if beneficiaries exist under a State Act who could not qualify under the Longshoremen's Act.

incongruous results. How? First, it provides the Longshoremen's Act as the uniform compensation remedy for those workers who prior to the 1972 Amendments were covered by it only for that part of their work activity on navigable waters, and by a state act for their work activity on land (workers like Caputo). And second, it leaves completely undisturbed the uniform compensation remedy provided by state law for those whose work activity is solely on land (workers like Ford and Bryant). This is precisely the specific evil which Congress sought to eliminate, and a statute should not be construed to extend beyond the mischief it was intended to remedy.[76]

There is nothing in the Amendments or the legislative history from which it can be reasonably implied that Congress intended to extend the Act's jurisdiction as the Director proposes—to cover all workers physically handling potential maritime cargo on an adjoining area.[77]

76. 2A Sutherland, STATUTORY CONSTRUCTION, § 54.04 (4th Ed. 1973). In *United States v. Champlin Refining Co.,* 341 U.S. 290, 297 (1951), the Court applied this principle of looking to the mischief intended to be cured in declining the application of a broadly worded federal statute beyond the purpose for which it was intended. As noted in *Caputo,* 432 U.S. at 272, Congress set out to solve a uniformity problem. No such uniformity problem existed in 1972, and none exists now, as to persons such as Ford and Bryant.

77. Petitioners' suggested status test also serves to minimize the conflict and/or overlap of federal and state compensation remedies, while the Director's cover-the-waterfront approach maximizes it. For discussion of some of the problems this Director's maximization creates, such as exclusive v. concurrent jurisdiction, and if concurrent jurisdiction is the answer, those relating to *res judicata,* collateral estoppel, election of remedies, the full faith and credit clause of the Constitution, etc., see the already conflicting decisions from the Court of Appeals for the Fourth Circuit in *Pettus v. American Airlines, Inc.,* ____F.2d____ (September 26, 1978) and *Newport News Shipbuilding & Dry Dock Company v. Director, Office of Workers' Compensation Programs,* 583 F.2d 1273 (September 21, 1978).

While Congress was obviously upset and displeased, and rightfully so, at the disparity in benefits between the various state and federal acts, it recognized that extending the Longshoremen's Act ashore was not the proper way to correct this evil on an overall basis. How? By specifically excluding from the jurisdictional extension in the legislative history (1) various waterfront employees (i.e., transshipment workers like the truck driver in Caputo, checkers not "directly involved in the loading or unloading" of vessels and "individual[s] employed by a person none of whose employees work, in whole or in part, on navigable waters") and (2) various waterfront employers (those employers none of whose workers work, in whole or in part, on navigable waters).

That the Congressional purpose did not include correction of this overall evil is further demonstrated by the fact that the principal sponsors of the 1972 Amendments, Senator Williams of New Jersey and Senator Javits of New York, had waiting in the wings specific legislation to correct this overall evil, not just on the waterfront, but throughout the entire country. In the very next year of 1973, the Senators introduced legislation entitled the National Workers' Compensation Standards Act of 1973 to establish national minimum standards of compensation benefits with which a state would be compelled to comply throughout the entire state and not just on their water fronts. S.2008, 93d Congress, 1st Session, Cong. Rec. p. S11285.[78]

Petitioners respectfully submit that their suggested maritime employment status test is as liberal an interpretation of the 1972 Amendments as the Congressional purpose will permit. In contrast, the Director's cover the waterfront approach requires not just a liberal construction of the Act, but a judicial amendment to cover those waterfront employees who had before the 1972 Amendments, and who still have, a uniform compensation remedy for all of their work activities ashore.

78. Successor bills have been introduced in subsequent sessions, with the most recent bills being S. 3060, 95th Congress, 2d Session, introduced on May 11, 1978 in the Senate and H. Rep. 2058, 95th Congress, 2d Session, in the House of Representatives.

THE STATUTORY PRESUMPTION OF COVERAGE

The court below considered that it was "bound by a statutory presumption that an individual claim comes within the Act's coverage. 33 U.S.C. § 920(a)." 539 F.2d at 541, Pet. pp. 42-43. In fact, the statutory language is as follows:

> "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) That the claim comes within the provisions of this chapter.
>
> * * *", 33 U.S.C. § 920.

This Court has specifically treated the presumption section of the Longshoremen's Act in the context of a fact-finder's ruling that a claim was not compensable. In *DelVecchio v. Bowers*, 296 U.S. 280 (1935), the Court wrote with respect to the provision of Section 920 pertaining to suicide, 33 U.S.C. § 920(d), which is a parallel provision to the coverage language quoted above, 33 U.S.C. § 920(a). Both depend on the unlettered introductory portion of the section. This Court held that the only purpose of the presumption is "to

control the result when there is an entire lack of competent evidence," 296 U.S. at 286, and that when evidence is submitted, "the presumption falls out of the case." Id.[79] In the present cases both Administrative Law Judges specifically found the presence of substantial evidence, *Ford*, App. p. 39, *Bryant*, App. p. 91, and no suggestion has ever been raised that all facts of the individual Respondents' employment were not before the Administrative Law Judges at the time of their decisions. In this situation the statement of the Court of Appeals that it was "bound" by the statutory presumption of coverage is absolutely erroneous and taints its entire opinion, particularly the treatment of the *Bryant* case where the presumption is explicitly relied upon. Pet. p. 49. The Court should therefore reaffirm *DelVecchio* as to the proper consideration to be given to the statutory presumptions.

NO SPECIAL DEFERENCE IS OWED TO THE BENEFITS REVIEW BOARD IN THESE CASES

Over the years this Court has developed a significant body of law pertaining to judicial review of federal administrative action. Various guidelines have evolved according to whether the issue is a question of law (within the particular and non-delegable competence of a court) or a matter for agency discretion (committed by Congress

79. "The statement in the act that the evidence to overcome the effect of the presumption must be substantial adds nothing to the well understood principle that a finding must be supported by evidence. Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence." 296 U.S. at 286 (footnotes omitted).

to the expertise of the executive agency). The difficulty is in knowing how to classify the question (legal or discretionary?). DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES (1976) pp. 688-693.

In the present cases, the court below has classified the question of the jurisdictional coverage of the Act as a matter committed to agency discretion not subject to judicial review for correctness but bound to be affirmed if capable of legal rationalization. 539 F.2d at 541, Pet. p. 43. Two other Circuit Courts of Appeals have expressly rejected this approach to post-1972 jurisdiction questions, however, finding that the Benefits Review Board[80] is more of an umpiring rather than discretionary agency and that in any event, the present issue of statutory construction is a legal issue properly given plenary scrutiny by the reviewing court.[81]

The cases relied on by the court below do not support its deference to the Benefits Review Board in the present context. Both are pre-Amendment cases[82] which decline to overturn fact findings and inferences of the Deputy Commissioners of Labor, who provided initial adminis-

80. The Benefits Review Board was created by the 1972 Amendments, 33 U.S.C. § 921(b)(1), for the purpose of hearing appeals under the Longshoremen's Act. 33 U.S.C. § 921(b)(3). It has currently been designated to hear similar appeals under numerous other statutes.

81. *Stockman v. John T. Clark & Son of Boston*, 539 F.2d 264, 269 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); *Pittston Stevedoring Company v. Dellventura*, 544 F.2d 35, 47 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

82. 539 F.2d at 541, Pet. p. 43, as follows:
"*See O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508, 71 S.Ct. 470, 95 L.Ed. 483 (1951); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 478-79, 67 S.Ct. 801, 91 L.Ed. 1028 (1947)."

trative adjudication under the pre-Amendment procedure. In 1972, the functions of the Deputy Commissioners with respect to adjudication were transferred to Administrative Law Judges. 33 U.S.C. § 919(d). In both of the claims presently before this Court, the respective Administrative Law Judges made fact findings based on the stipulations of the parties and drew the conclusions that the claimants were not in maritime employment. If *Cardillo* and *Brown-Pacific-Maxon* were applicable to these cases, the limited review principle should be applied to the findings of no jurisdiction. In this regard, note that the Board's review is specifically limited by the substantial evidence rule. 33 U.S.C. § 921(b). While Petitioners believe, with the First and Second Circuits, that the question of shoreside jurisdiction is a legal issue requiring judicial analysis, the court below not only deferred to the executive agency and limited its review of that agency's action, but also chose the opinion of the Benefits Review Board to defer to rather than the opinion of the Administrative Law Judges. In view of the assumption by the Administrative Law Judges of the adjudicatory responsibilities of the Deputy Commissioners, what then is the function of the Benefits Review Board?

Clearly, the Board has an appellate function. 33 U.S.C. § 921(b). As noted by Judge Friendly, the Board's function is that of an umpire, but only in an appellate context, for the Board's review is specifically limited by a substantial evidence standard. *Dellaventura, supra,* 544 F.2d at 49. The Board in theory provides a nationwide coherence to the administration of the several Acts whose claims it reviews, but on a question of statutory construction such as the current cases present,[83] there is no

83. *Stockman, supra,* n. 81, 539 F.2d at 270.

expertise in the Board superior to that of the federal courts. Perhaps the best demonstration of the error of deferring to the Board in these jurisdiction cases is this Court's treatment of the jurisdiction issues in *Caputo.* In that case the Court of Appeals for the Second Circuit had specifically considered and rejected the judicial deference approach to review of the Board's decisions. This Court did not hesitate to review in detail the jurisdictional, statutory interpretation questions presented in *Caputo,* even though the judicial deference approach was clearly in the case below. The Court should reject the holding of the court below that it must defer to the Board on jurisdictional issues.

CONCLUSION

In view of the fact that claimant Ford and claimant Bryant were not engaged in maritime employment, either by occupation or as amphibious workers on the day of their injuries, Petitioners respectfully pray that the Court reverse the decisions of the court below and hold that these claims are not covered by the Longshoremen's Act as amended in 1972.

Respectfully submitted,

E. D. VICKERY
W. ROBINS BRICE
3710 One Shell Plaza
Houston, Texas 77002
713/224-8380
Attorneys for Petitioners

Of Counsel:
ROYSTON, RAYZOR,
VICKERY & WILLIAMS
Houston, Texas